FILE COPY

FILED
NOV 14 1958
JAMES R. BROWNING, Clerk

No. 515

In the Supreme Court of the United States

OCTOBER TERM, 1958

FEDERAL POWER COMMISSION, PETITIONER

v.

MIDWESTERN GAS TRANSMISSION COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
LEONARD B. SAND,
Assistant to the Solicitor General,
SAMUEL D. SLADE,
PETER H. SCHIFF,
Attorneys,
Department of Justice, Washington 25, D. C.

WILLARD W. GATCHELL,
General Counsel,
HOWARD E. WAHRENBROCK,
Solicitor,
Federal Power Commission,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Reasons for granting the writ	13
Conclusion	22
Appendix A	24
Appendix B	50

CITATIONS

Cases:

American Louisiana Pipe Line Company, Docket Nos. G-2306, et al., Opinion No. 316, issued October 31, 1958 ..... 6, 14, 15

American Public Power Association v. *Power Authority*, 355 U. S. 64 16

Ashbacker Radio Corporation v. *Federal Communications Commission*, 326 U. S. 327 ..... 2, 10, 11, 17, 18, 19, 21, 22

Bracken v. *Securities & Exchange Commission*, 299 U. S. 504 16

Brownlow v. *Schwartz*, 261 U. S. 216 ..... 16, 18

Delta Air Lines v. *Civil Aeronautics Board*, 228 F. 2d 17 10

Duke Power Co. v. *Greenwood County*, 299 U. S. 259 ..... 15, 18

Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134 ..... 18, 22

Leader v. *Apex Hosiery Co.*, 302 U. S. 656 16

McKay v. *Clackamas County*, 349 U. S. 909 16

Mansfield Journal Co. v. *Federal Communications Commission*, 173 F. 2d 646 17–18

Montgomery Ward & Co. v. *United States*, 326 U. S. 690 16

Cases—Continued

National Association for the Advancement of Colored People, Incorporated v. *Committee on Offenses*, No. 84, this Term, decided October 13, 1958 — Page 16

Natural Gas Pipeline Company of America, Docket Nos. G-9966, et al., Order issued November 7, 1958 — 6

Northeastern Gas Transmission Co. v. *Federal Power Commission*, 195 F. 2d 872, certiorari denied, 344 U. S. 818 — 21

United States v. *Anchor Coal Co.*, 279 U. S. 812 — 16

United States v. *Munsingwear*, 340 U. S. 36 — 15

Western Air Lines v. *Civil Aeronautics Board*, 184 F. 2d 545 — 18

Statutes:

Natural Gas Act, 52 Stat. 821, as amended, 15 U. S. C. 717–717w:

Section 7 (c) — 3, 21, 50

Section 7 (d) — 51

Section 7 (e) — 20, 21, 51

Section 7 (f) — 21, 52

Section 7 (g) — 52

Section 19 (a) — 9, 52

Section 19 (b) — 2, 9, 52

Section 19 (c) — 53

28 U. S. C. 294 (a) — 10

In the Supreme Court of the United States

OCTOBER TERM, 1958

No.

FEDERAL POWER COMMISSION, PETITIONER

v.

MIDWESTERN GAS TRANSMISSION COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cause on May 13, 1958 and September 30, 1958.

OPINIONS BELOW

The opinions of the Court of Appeals for the District of Columbia Circuit (App. A, *infra*, pp. 24–48) are reported at 258 F. 2d 660. The orders of the Federal Power Commission (R. 441–452, 453–477, 515–534) are reported at 17 F. P. C. 461, 671.

JURISDICTION

The judgment of the Court of Appeals setting aside the Commission's orders was entered on May 13, 1958 (App. A, *infra*, p. 49). A petition for rehear-

280,998 Mcf of natural gas per day to 43 distributors for resale in 125 communities in Minnesota, Wisconsin, Michigan, and North Dakota which are now without natural gas service and 115,000 Mcf of natural gas per day to two steel companies, United States Steel and the Inland Steel Company, in the Chicago, Illinois, and Gary, Indiana, area.

At the time that the review of the Commission's orders was sought, the Natural Gas Pipeline Company of America, pursuant to its application of February 14, 1956, as amended, was seeking authorization to increase the sales capacity of its present system by 485,000 Mcf of natural gas per day (R. 359–366). All of the sales were proposed to be made to existing customers for resale (R. 151). Included in this volume were 100,000 Mcf of additional sales to Northern Indiana Public Service Company (Nipsco) and 125,000 Mcf to The Peoples Gas Light and Coke Company for local distribution (*id.*). Nipsco contemplated sales of 25,000 Mcf of natural gas per day to the United States Steel Corporation and 45,000 Mcf of natural gas per day to Inland Steel Company in estimating its need for an additional volume of gas from Natural, and Peoples contemplated the sale of 45,000 Mcf of natural gas per day to the United States Steel Corporation. Thus, the proposed service to the steel companies through Natural's distributors was the same as that proposed by Midwestern (R. 443-444). However, both Nipsco and Peoples asserted that their market demand was such that the proposed purchases from Natural did not depend upon the sales to the two steel companies (R. 138). Natural, Peoples, and Nipsco

placed in the record their consent that the final allocation of this 115,000 Mcf of natural gas per day by Peoples and Nipsco be held in abeyance pending final decision on the proposed sales to the steel companies by Midwestern, and any certificate to Natural could have been conditioned to prevent such sales (R. 139–142). The application of Natural which was pending before the Commission at the time the review proceedings were instituted in the court below did not, therefore, depend upon the sales to the steel companies sought to be served by Midwestern.

To carry out its proposed sales capacity expansion of 485,000 Mcf of natural gas per day, Natural was proposing to obtain 460,000 Mcf of natural gas per day from Colorado Interstate Gas Company (R. 360). As the court below was advised by the Commission in its motion to vacate the opinion and judgment for mootness, filed on September 4, 1958, Colorado Interstate on July 29, 1958 cancelled its contract with Natural to supply this additional 460,000 Mcf (R. 760). Accordingly, on September 2, 1958, Natural filed a motion with the Commission to amend its application so as to apply only for authorization to expand the capacity of its transmission facilities in the amount of 35,000 Mcf (*id.*).[2] As the Commission also ad-

[2] Natural's application as thus amended seeks permanent authorization for compressor facilities already built under temporary authorization granted by the Commission on April 12, 1957, before the judicial review proceeding was instituted. These facilities have been in operation since December 3, 1957, under temporary authorization granted by the Commission on December 12, 1957, for the delivery of gas to Natural's existing customers. See *Natural Gas Pipeline Company of America*, Docket Nos. G–9966, et al., Order issued November 7, 1958.

vised the court below, this amendment eliminated any possibility that Natural's expansion would involve resales by local distributor customers to supply the 115,000 Mcf to the two steel companies which Midwestern sought to supply (*id.*). The Commission has now granted Natural's request to amend its application. *American Louisiana Pipe Line Company*, Docket Nos. G–2306, et al., Opinion No. 316, issued October 31, 1958; *Natural Gas Pipeline Company of America*, Docket Nos. G–9966, et al., Order issued November 7, 1958.

Proceedings before the Commission.—On July 25, 1956, the Commission consolidated and set for hearing the application of Natural and certain interrelated applications (R. 328). On September 24, 1956, the Commission permitted Midwestern and Tennessee Gas Transmission Company (which have the same interests) to intervene in that consolidated proceeding on the basis of their petition alleging that the Midwestern and Natural applications "are competitive and mutually exclusive with respect to service to U. S. Steel and Inland Steel" (R. 351, 375). On October 18, 1956, Midwestern and Tennessee moved to consolidate for hearing their applications with those of Natural, Northern Natural Gas Company and Michigan Wisconsin Pipe Line Company (R. 382).[3] On October 22, 1956, Natural asked the Commission to reconsider its order of September 24, 1956, permitting the intervention of Midwestern and Tennessee on

[3] For the nature of the applications submitted by these companies, see fn. 4, *infra*, p. 8.

the ground that the applications were not mutually exclusive (R. 410). At the same time Natural requested, in the alternative, that the question of exclusivity be decided as a preliminary issue. By order of November 30, 1956, as modified by the order of December 26, 1956, and interpreted by the order of January 31, 1957, the Commission set the Natural case for hearing (R. 426, 428, 433), and directed that the evidence as to market demands be heard first and that after this evidence had been received it should be certified to the Commission immediately so that a preliminary decision could be made with respect to the "issue of exclusiveness" between the Natural and Midwestern proposals (R. 432).

On March 13, 1957, after this preliminary hearing was completed and the record certified to it, the Commission filed the first order reviewed by the court below (R. 441–452). The Commission found that Natural would desire authorization to construct and operate its proposed project even if it were denied authorization to sell natural gas to Nipsco and Peoples for resale to the two steel companies also sought to be supplied by Midwestern (R. 445), and that Midwestern had not proposed to sell natural gas to any existing customers of Natural or to customers served indirectly from the facilities of Natural except the two steel companies (R. 450). The Commission also found that, in light of the consent of Natural, Peoples, and Nipsco that the final allocation of 115,000 Mcf of natural gas per day to Nipsco and Peoples could await the outcome of Midwestern's application and

"the fact that the record indicates greatly increasing requirements for natural gas in the existing markets served by Natural Gas over and above the proposed service to the steel plants," there was no reason why the noncompetitive aspects of Natural's application should not proceed to a conclusion without being consolidated with Midwestern's application (R. 447). But the Commission did order the severance from those proceedings of that portion of Natural's application which related to the authorization to transport and sell 115,000 Mcf of natural gas per day to Nipsco and Peoples for resale to the two steel companies which Midwestern also sought to serve (R. 452).

On March 29, 1957, the Commission issued an order (1) consolidating for hearing the application of Midwestern with the competitive portion of the Natural application as well as the competitive portions of the certificate applications of Northern and Michigan Wisconsin and those interrelated with the Midwestern, Northern and Michigan Wisconsin applications;[4] and

---

[4] This consolidated case, which has been termed the "Omnibus" case, resulted from the fact that customers proposed to be served by Midwestern included customers also proposed to be served by Northern and Michigan Wisconsin, as well as Natural. Northern has sought authorization to increase its existing capacity and sales by 149,514 Mcf of natural gas per day (R. 459–461). Of this volume, 47,057 Mcf of natural gas per day is for increases to sales to existing customers and the balance for new sales distributors serving 192 communities in Iowa, Nebraska, Minnesota, and Wisconsin not now served with natural gas (32 of these distributors in Minnesota and Wisconsin are also proposed to be served by Midwestern) and to Iron Ranges Natural Gas Company for resale to distributors in 21 communities in northern Minnesota (19 of these distributors

(2) terminating the intervention of Midwestern and Tennessee in the Natural case since it was found that the only interest of Midwestern in the Natural case which might be affected related solely to the service to the two steel companies (R. 453–478). This was the second order reviewed below.

An appeal from the action of the Commission's Secretary who rejected an application by Midwestern and Tennessee for a rehearing of the March 13 and March 29 orders was dismissed by the Commission on the ground that these orders were not of the type that were subject to rehearing and court review under Section 19 (a) and (b) of the Natural Gas Act, *infra*, pp. 52–53. In dismissing this appeal, the Commission described the range of issues in the "Omnibus" case to be heard with respect to service to the steel companies, concluding (R. 533):

> * * * In other words every party must offer in the comparative hearing testimony with respect to each of the elements that would go into the ultimate determination of the certificate application notwithstanding the fact that like evidence may have been presented in connection with another aspect of the same application.

It may be noted that there are more than 160 parties represented by approximately 120 counsel in the

---

are also proposed to be served by Midwestern). Michigan Wisconsin has sought an authorization to sell 61,385 Mcf of natural gas per day to ten distributing companies proposing service to 36 communities in Wisconsin and Minnesota, most of which are also proposed to be served by Midwestern (R. 455–458).

"Omnibus" case, while there are 34 parties represented by 25 counsel in the Natural case.

Proceedings in the court below.—In a divided decision, with Mr. Justice Reed[5] dissenting, a three-judge division of the court below held (1) that *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327, requires the consolidation for hearing of applications which are mutually exclusive and (2) that under its ruling in *Delta Air Lines* v. *Civil Aeronautics Board*, 228 F. 2d 17, judicial review was not premature but may be sought before the grant of any application when the Commission adopts a procedure which precludes a true comparative hearing of conflicting applications.[6] The court also held that the Commission should have treated Midwestern's application as a general proposal to serve the area of northern Illinois and Indiana already being served by Natural and its affiliates, and that accordingly the area of mutual exclusiveness between the Midwestern and Natural applications related to more than the proposed service to the steel companies. Furthermore, the majority also concluded that the compar-

[5] Mr. Justice Reed sat by designation pursuant to 28 U. S. C. 294 (a).

[6] The Commission's contention that the petition for review should be dismissed for prematurity was originally raised by a motion to dismiss filed on August 8, 1957 (R. 554). This motion was denied by an order dated October 24, 1957, without prejudice to renewal at the hearing of the case on the merits (R. 595). The Commission, in its brief on the merits, again urged dismissal of the petition on the ground of prematurity, in addition to contending that the procedures adopted by the Commission had been fair in all respects and that they complied with the principle of the *Ashbacker* case, *supra*.

ative hearing in fact accorded to Midwestern by the Commission would be inadequate under the *Ashbacker* case because the issue to be determined in that comparative hearing was limited to the question of which applicant should serve the steel companies, even though the Commission had required Natural to present complete evidence in each proceeding as to gas supply, economic feasibility, financing, and design of facilities relating to its entire expansion proposal. In dissenting, Mr. Justice Reed concluded that the majority had erred in construing Midwestern's application as a general proposal to serve the area of northern Illinois and Indiana, stressing the fact that Midwestern's application stated a daily capacity of 401,574 Mcf of natural gas per day and that its application, as amended, allocated 395,998 Mcf of natural gas per day so that Midwestern "would seem to have little to offer the Chicago area consumers" (App. A, *infra*, p. 47).

In its petition for rehearing (R. 721–738) the Commission argued that, even accepting the majority's view that Midwestern's proposal must be read broadly as one proposing service to the entire northern Illinois-Indiana area, the record provided no basis for assuming that the grant of Natural's application would preclude the grant of Midwestern's present application or even preclude such sales as Midwestern proposes to make when the capacity of its proposed pipeline is up to full capacity with additional compression added. To the contrary, the Commission pointed to the assertion of the majority below and to the supporting contentions of both sides regarding

market demand as suggesting that the unsatisfied market demand in the northern Illinois-Indiana area was sufficiently great to permit grant of Natural's application as well as grant of Midwestern's proposal read broadly. The division which decided the case denied a petition for rehearing, with Mr. Justice Reed dissenting (App. A, *infra*, pp. 49–50). The court sitting *en banc* (Mr. Justice Reed not participating) denied rehearing by a vote of 5 to 4 (App. A, *infra*, p. 49).

Thereafter, as noted above (p. 5), the Commission, in a motion to vacate for mootness, brought to the attention of the court below the fact that on September 2, 1958, Natural's application for authorization to expand its pipeline capacity, transportation, and sales to local distributors in the northern Illinois-Indiana area by 485,000 Mcf of natural gas per day was amended so as to apply for an authorization for expansion in the amount of only 35,000 Mcf. The court below was also advised that this amendment, which has now been accepted, *supra*, pp. 5–6, eliminated any possibility that Natural's expansion would involve resales by its local distributor companies to supply the 115,000 Mcf of natural gas to the two steel companies which Midwestern seeks to supply.[7] Midwestern and Tennessee, the petitioners in the review

[7] Since the amendment of Natural's application was made necessary by the cancellation of Colorado Interstate's contract to supply 460,000 Mcf of gas per day, as a practical matter the Commission could either accept the amendment, as it has done, or reject Natural's entire application for failure to show adequate gas supply. In any event, the facts necessitating the amendment foreclosed the possibility that Natural could supply the steel companies.

proceeding in the court below, filed a response to the motion to vacate in which they stated that "grant by the Commission of Natural's motion to amend its application (Docket G-9966) so as to reduce its proposed sales to 35,000 Mcf of gas per day on the basis set forth in said motion to amend, would, as a practical matter, moot the questions of the necessity for a comparative hearing or intervention by Midwestern and Tennessee in the Natural, et al., proceedings" (R. 763–764). The court below, without opinion, denied the Commission's motion to vacate the opinion and judgment for mootness (App. A, *infra*, p. 50).

REASONS FOR GRANTING THE WRIT

I. THE CASE HAS BECOME MOOT

When cancellation of its supply contract compelled Natural to modify its certificate application so as to request authorization to expand its capacity in the amount of 35,000 Mcf per day instead of the previously requested increase of 485,000 Mcf per day (*supra*, p. 5), any supposed need for a consolidation of the hearing on that application with the other applications pending before the Commission in the "Omnibus" proceeding was eliminated and this case became moot. Prior to the amendment of the Natural application, both Midwestern and Natural were seeking certificate authorizations which would, *inter alia*, have enabled each to supply 115,000 Mcf per day for the same two steel companies. The Natural amendment eliminated any possibility that Natural's expansion would permit its local distributors to supply the 115,000 Mcf requirement of these companies. And,

apart from the question of the steel companies, Natural's present application, limited as it is to a request for permanent authorization for compressor facilities already built and in operation (see fn. 2, p. 5, *supra*), is not one in which Midwestern, petitioner below, has an interest sufficient to cause it to desire a consolidation of the hearing on that application with its proposals. Thus, in its answer in the court below to the Commission's motion to vacate, Midwestern conceded that Natural's amendment to its certificate application "would, as a practical matter, moot the questions of the necessity for a comparative hearing or intervention by Midwestern and Tennessee in the Natural, *et al.* proceedings" (R. 764).

Moreover, while the Commission's motion to vacate for mootness was pending in the Court of Appeals, Midwestern and Tennessee asked the Commission to render its decision in the "Omnibus" proceedings prior to November 1, 1958, even though the previously-requested fully-consolidated hearing with the Natural application had not been held.* (On October 31, 1958, the Commission issued its opinion and order in the "Omnibus" case, finding, *inter alia*, that Midwestern's application should be rejected because of the failure to show a firm gas supply from Canada and the failure to show service to markets in the Chicago area which meets the standards of public convenience and

---

*See Joint Motion of Midwestern Gas Transmission Company and Tennessee Gas Transmission Company to Omit Intermediate Decision Procedure and for Oral Argument before Commission, filed September 15, 1958, in *American Louisiana Pipe Line Company*, Docket Nos. G-2306, et al. A copy of this Joint Motion has been lodged with the Clerk of this Court.

necessity. *American Louisiana Pipe Line Company*, Docket Nos. G–2306, et al., Opinion No. 316.) These actions of Midwestern and Tennessee demonstrate, we submit, that they no longer have any interest in a consolidation of the "Omnibus" and Natural proceedings or in intervening in the Natural case, the relief which was denied by the Commission orders reviewed below. This conclusion is also borne out by the statement of Midwestern and Tennessee at p. 12 of their Joint Motion, *supra*, that "[e]very party has already been accorded a full and complete hearing." Consequently, there is no longer any relief with respect to consolidation which any of the parties seek of either the Commission or the courts—so that the case is now clearly moot. Mootness is even more apparent in view of the Commission's order of October 31, 1958, *supra*, denying Midwestern's application for reasons based on deficiencies in that application on its individual merits. In view of the reduced scope of the Natural application and the denial of the Midwestern application in the "Omnibus" proceedings, it is apparent that there is nothing left which could reasonably require consolidation.

Since the case has become moot the opinion and judgment below should be vacated. This Court has held that where mootness occurs it is "the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss." *Duke Power Co. v. Greenwood County*, 299 U. S. 259, 267; see *United States v. Munsingwear*, 340 U. S. 36, 39–40. Failure to vacate the opinion and judgment below would leave the order

requiring consolidation in effect notwithstanding the fact that the circumstances have now changed to such an extent that consolidation is no longer desired by any party to this proceeding. As this Court has made clear, where a controversy has become moot it "is no longer a subject appropriate for judicial action" and litigation should be ended at once. *Brownlaw* v. *Schwartz*, 261 U. S. 216, 219; *United States* v. *Anchor Coal Co.*, 279 U. S. 812, 813. Accordingly, we respectfully request that this Court grant the petition for a writ of certiorari, vacate the judgment of the Court of Appeals and remand the cause to the Court of Appeals with directions to dismiss the petition for review as moot. See, *e. g.*, *National Association for the Advancement of Colored People, Incorporated* v. *Committee on Offenses*, No. 84, this Term, decided October 13, 1958; *American Public Power Association* v. *Power Authority*, 355 U. S. 64; *McKay* v. *Clackamas County*, 349 U. S. 909; *Montgomery Ward & Co.* v. *United States*, 326 U. S. 690; *Leader* v. *Apex Hosiery Co.*, 302 U. S. 656; *Bracken* v. *Securities & Exchange Commission*, 299 U. S. 504.

II. IF FOR ANY REASON THIS CASE HAS NOT BECOME MOOT, THE DECISION BELOW SHOULD BE REVIEWED AND REVERSED ON THE MERITS

If, contrary to our contention in Point I, *supra*, this Court should be of the view that this case has, for any reason, not become moot, we submit that the decision below should be reviewed and reversed on the

merits because the Court of Appeals has erroneously decided an important question of administrative law in a manner which will seriously handicap the Commission and other regulatory agencies in the efficient arrangement of their proceedings, without any concomitant protection of the rights of an applicant to a fair and expeditious hearing.

In *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327, the decision which the majority below thought controlling here, the Federal Communications Commission had granted one of two applications for broadcasting station permits which it had found to be mutually exclusive and had then set the second application for hearing. This Court, noting that an applicant for a license had been accorded a right to a hearing by Congress, set aside the grant, holding "that where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him". 326 U. S. at 333.

In construing the *Ashbacker* doctrine, the courts of appeals have recognized that consolidation or comparative consideration of rival applications is required only upon a showing that the grant of one or more of such rival applications and certificates of public convenience and necessity would, in practical effect, preclude the grant of any others. Furthermore, in the absence of such mutual exclusiveness there would seem to be no jurisdictional basis for judicial review of a refusal to order consolidation. *Mansfield Journal Co.* v. *Federal Communications*

Commission, 173 F. 2d 646 (C. A. D. C.). But, as we discuss below (pp. 19–21), in the present case, there was no showing—and indeed could not have been—that the grant of Natural's application to sell 35,000 Mcf of natural gas per day would, in effect, preclude grant of Midwestern's application.[9] Accordingly, the *Ashbacker* case lends no support to the decision below requiring consolidation. The Court of Appeals, instead of applying the criterion of mutual exclusiveness used in *Ashbacker*, evidently adopted a different and much broader standard which, we submit, ignores the salutory doctrine of *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138, that the courts shall not interfere with routine procedural determinations made by a regulatory agency unless, as in *Ashbacker*, a private right has been disregarded.[10] And the consequences of the standard ap-

---

[9] Since this Court has made it clear that post-decision events may render a case moot, see, *e. g.*, *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259; *Brownlow* v. *Schwartz*, 261 U. S. 216, and in view of the refusal of the court below to vacate its opinion and judgment for mootness, it must be assumed that the decision of that court was deemed by it to be applicable to the facts as they existed after the application of Natural was amended on September 2, 1958. Thus, for the purposes of this petition we will regard Natural's application as one to increase its capacity by only 35,000 Mcf of natural gas per day, instead of the 485,000 Mcf increase originally requested.

[10] Moreover, as we reserve the right to argue should review on the merits be granted, see fn. 1, p. 2, *supra*, there is no basis for the further assumption of the court below that under *Ashbacker* a certificate applicant has an independent right to consolidation regardless of whether a rival's application has been granted. This view is in conflict with the Ninth Circuit's intepretation of *Ashbacker* in *Western Air Lines* v. *Civil Aeronautics Board*, 184 F. 2d 545.

parently adopted by the Court of Appeals would be, we submit, to prolong and needlessly complicate administrative hearings without achieving a commensurate gain in the adjudicatory process.

The holding of the court below that the Commission had not afforded Midwestern the comparative hearing required under *Ashbacker* is evidently based entirely on its view that Midwestern's application should have been treated as a proposal to make unspecified sales in the general area of northern Illinois and Indiana and that the Commission had misconstrued the area of mutual exclusiveness.[11]

If the holding of the majority means that the Commission should not have interpreted Midwestern's present application with respect to the northern Illinois-Indiana area as a proposal to sell 115,000 Mcf of natural gas per day only to the steel companies but rather as one to sell this quantity of natural gas to either the steel companies or to any other potential customer in the northern Illinois-Indiana area, the record does not at all support the majority's conclusion that grant of the application so construed would, in practical effect, be precluded by a grant of the Natural application. Indeed, both the Commission and the court below recognized that there

[11] Prior to the amendment of Natural's application so as to request an increase in capacity of only 35,000 Mcf, a possible construction of the court's opinion might have been that it rested on the belief that the comparative hearing which had been accorded by the Commission with respect to the service to the two steel companies was inadequate. The refusal of the court below to vacate for mootness dispels that possibility. See fn. 9, p. 18, *supra*.

was a vast unsatisfied demand for natural gas in the northern Illinois-Indiana area (R. 447, App. A, *infra*, p. 32). And even if Midwestern's application were treated as a proposal to make sales up to the full capacity of its proposed line with additional compression added, instead of one merely to supply the 115,000 Mcf for which authorization was sought,[12] there was never any basis for assuming that the gas which would be supplied pursuant to the applications so construed would be likely to saturate the vast demand in the northern Illinois-Indiana area (R. 727–735). Since Natural now seeks to increase its sales by only 35,000 Mcf, instead of the 485,000 Mcf originally sought, such an assumption would be even more unwarranted. There was no reason therefore why the Commission could not, in practical effect, grant both applications if it saw fit to do so. Accordingly, even if the court, contrary to the Commission's determination, were correct in construing Midwestern's application as one to supply all the gas which its proposed line could transmit to any possible customers in the northern Illinois-Indiana area there is no basis for finding the applications of Midwestern and Natural mutually exclusive.

In these circumstances, there could be no mutual exclusiveness unless the court below took the view that the Commission must treat every application to make limited sales at present as an open-ended proposal to make unspecified sales generally in the entire

[12] Of course, an additional certificate of public convenience and necessity would have to be granted before any additional compression could be added. See Section 7 (e) of the Natural Gas Act, *infra*, pp. 51–52.

area in which the specific sale is to be made, even though the applicant is not required to make any showing with respect to future sales as to gas supply, design of facilities, economic feasibility, or financibility, and has not applied for certificate authority to do so. Such treatment would ignore the practice of the Commission for, while the Commission is authorized by Section 7 (f) of the Natural Gas Act, *infra*, p. 52, to determine the "service area" of the pipeline company and the latter may then enlarge or extend its facilities within that area without further authorization from the Commission, the Commission has never made such a determination in any proceeding. Rather, as here, the Commission has always sought to decide certificate applications upon the basis of sales to specific distributing companies or other customers which the applicants are proposing to serve. Significantly, no application in this case was filed under Section 7 (f).[15]

It is apparent therefore that the holding of the court below cannot rest on *Ashbacker* or on a finding of mutual exclusiveness. Instead, the court's decision amounts to a holding that whenever two or more applications for certificates involving service to the same area are pending before the Commission they must,

[15] Construing Midwestern's application as one for a "service area" would also be inconsistent with the view expressed by the Third Circuit in *Northeastern Gas Transportation Co.* v *Federal Power Commission*, 195 F. 2d 872 (C. A. 3), certiorari denied, 344 U. S. 818, that certificate applications under Section 7 (c) and (e) of the Natural Gas Act, *infra*, pp. 50–52, like those involved here, are not for permission to serve an entire area, exclusive or otherwise.

as a matter of law, be heard and acted upon simultaneously even though they are not mutually exclusive. We do not see how such a conclusion can be predicated on *Ashbacker* or the statutory right of an applicant to receive a fair hearing. And, although this Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, has stated that subordinate questions of procedure in ascertaining the public interest have been left to the discretion of the administrative agency, the result and opinion below constitute an unwarranted substitution by the Court of Appeals of its judgment for that of the administrative agency with regard to such procedural matters.

Moreover, in this instance, as subsequent developments clearly show, consolidation at the time and in the manner which the court below would require would have served only to prolong and complicate the administrative proceedings without affecting the ultimate outcome. The events which have occurred since the decision of the court below—*i. e.*, the amendment of the Natural application and the rejection of Midwestern's application in the "Omnibus" case (*supra*, pp. 5, 14)—themselves illustrate the wisdom of leaving such procedural questions for resolution by the administrative agency.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted, that the judgment of the court below be vacated, and that the cause be remanded to the Court of Appeals with directions to dismiss the petition for

review as moot. Alternatively, we respectfully submit that the petition for a writ of certiorari should be granted so that this Court may review the case on the merits.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

LEONARD B. SAND,
Assistant to the Solicitor General.

SAMUEL D. SLADE,
PETER H. SCHIFF,
Attorneys.

WILLARD W. GATCHELL,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,
Federal Power Commission.

NOVEMBER 1958.

487963 O—58——4

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13954

MIDWESTERN GAS TRANSMISSION COMPANY, and
TENNESSEE GAS TRANSMISSION COMPANY, CORPORATIONS
PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

NATURAL GAS PIPELINE COMPANY OF AMERICA,
TEXAS ILLINOIS NATURAL GAS PIPELINE COMPANY,
CHICAGO DISTRICT PIPELINE COMPANY,
COLORADO INTERSTATE GAS COMPANY,
PACIFIC NORTHWEST PIPELINE CORPORATION,
INTERVENORS

On Petition for Review of Orders of the
Federal Power Commission

Decided May 13, 1958

Mr. Harry S. Littman, with whom *Messrs. William C. Braden, Jr., Jack Werner, Dale A. Wright, John D. Lane* and *Lambert McAllister* were on the brief, for petitioners.

Mr. Howard E. Wahrenbrock, Solicitor, Federal Power Commission, with whom *Messrs. Willard W. Gatchell*, General Counsel, Federal Power Commission, *Robert Lee Russell*, Assistant General Counsel, Federal Power Commission, and *Alvin A. Kurtz*, Attorney, Federal Power Commission, were on the brief, for respondent.

Mr. Clarence H. Ross, with whom *Messrs. John A. Kratz* and *Everett I. Willis* were on the brief, for intervenors Natural Gas Pipeline Company of America, Texas Illinois Natural Gas Pipeline Company, and Chicago District Pipeline Company.

Messrs. James Lawrence White and *John Fleming Keily* were on the brief for intervenor Colorado Interstate Gas Company. *Mr. Norman A. Flaningam* also entered an appearance for intervenor Colorado Interstate Gas Company.

Messrs. Charles E. McGee and *Francis H. Caskin* entered appearances for intervenor Pacific Northwest Pipeline Corporation.

Before REED, Associate Justice of the Supreme Court, retired*, and EDGERTON, Chief Judge, and BAZELON, Circuit Judge.

BAZELON, *Circuit Judge:* Review is sought, pursuant to § 19(b) of the Natural Gas Act,[1] of two orders of the Federal Power Commission, one a severance order issued March 13, 1957, and the other a consolidation order issued March 29, 1957.

I

THE APPLICATION

Petitioners Midwestern Gas Transmission Company (Midwestern) and Tennessee Gas Transmission Company (Tennessee) are proponents of a new pipeline system designed to supply natural gas to the Chicago-Gary area of northern Illinois-Indiana, the states of Wisconsin and

---

* Sitting by designation pursuant to the provisions of 28 U.S.C. § 294(a).

[1] 52 STAT. 831 (1938), 15 U.S.C. § 717r(b).

Minnesota, eastern North Dakota and western Michigan. Intervenors Natural Gas Pipeline Company (Natural), Texas Illinois Natural Gas Pipeline Company (Texas Illinois), and Chicago District Pipeline Company (Chicago District) are subsidiaries of Peoples Gas Light and Coke Company (Peoples), the distributor of natural gas in the Chicago area. Natural and Texas Illinois are the suppliers in Peoples system. Chicago District operates a short line transporting the gas from the Natural and Texas Illinois lines into Peoples' distribution lines.

The Peoples system operates a substantial monopoly in the natural gas business in northern Illinois-Indiana.[2] Despite the large quantities of gas brought into the area by the Peoples system, there is a large demand which cannot be met with the system's present capacity. In the city of Chicago alone, for example, there was a waiting list of 154,800 applicants for gas service as of the end of 1956.

Gas demand beyond existing capacity is a problem not only in the area served by the Peoples system, but all through the middle west. Serious gas shortages are experienced, for example, in the state of Wisconsin, which is served principally by the Michigan Wisconsin Pipe Line Company (Michigan Wisconsin), and in the state of Minnesota, which is served only by the Northern Natural Gas Company (Northern).

On October 10, 1955, Midwestern filed an application for a certificate of public convenience and necessity for a new pipeline system to run from a connection with Tennessee's system at Portland, Tennessee, to a connection with the system of Trans-Canada Pipe Lines Limited (Trans-Canada) at the Canadian border, near Emerson, Manitoba. Midwestern has contracts with both

---

[2] The monopoly is complete as to supply and, in the city of Chicago, as to distribution, but other companies share in the distribution function in the remainder of the area.

Tennessee and Trans-Canada for the purchase from each of 204,000 m.c.f.[3] of gas per day. The contract with Trans-Canada also gives Midwestern the right to purchase an additional 200,000 m.c.f. per day depending upon availability.[4] And the southern portion of Midwestern's proposed line, though designed to carry northward only the 204,000 m.c.f. to be purchased from Tennessee, "could, without additional looping but simply with added compression, carry as much as 350,000 m.c.f. a day to the Chicago area . . . ."[5] Midwestern's proposed line is to be so located as to be able to deliver gas to the shortage areas in northern Illinois-Indiana now served by the Peoples system, as well as to those in Wisconsin, Minnesota, western Michigan, and eastern North Dakota. And Midwestern made clear to the Commission that its intention is to serve all of the areas within economic reach of its line and that "if certificated it will, in the future, in the course of normal growth and development, serve, like all other pipelines and distributors, any available loads for which authorization can be obtained."[6]

In its original application, Midwestern specified the customers to whom it would deliver 315,202 m.c.f. per day and left 86,372 m.c.f. per day as a reserve for additional sales. In its first supplement to its application on November 2, 1955, Midwestern stated that this reserve was designed to supply other customers within reach of its line who are presently without gas or receiving short supplies. It stated further that specification of some distributors was made difficult by their fear of the displeasure of their present suppliers. In a further supple-

---

[3] The abbreviation represents "thousand cubic feet."

[4] *Midwestern Gas Transmission Company, et al.*, 16 F.P.C. 466, 470 (1956).

[5] *Id.* at 482.

[6] *Id.* at 478.

ment on December 1, 1955, Midwestern proposed to sell its reserved gas to the existing pipelines, including those in the Peoples system, for resale by them to their distributors.[7] If those pipelines declined to buy the reserved gas, Midwestern proposed to sell it directly to their distributors and to industries located within economic reach.

On December 22, 1955, Peoples and its subsidiaries petitioned to intervene in the proceeding on Midwestern's application. Both Natural and Texas Illinois, in their petitions, declared that they have "no intention of purchasing gas from Midwestern"; and Peoples, in its own petition, stated that "all natural gas sold by Peoples Gas . . . is purchased by it from Natural . . . and Texas Illinois . . . and it is contemplated that said companies will continue to supply Peoples Gas' requirements of flow gas in increased volumes as the orderly development of Peoples Gas' markets shall, from time to time, require." Being thus informed that the Peoples system would not purchase its reserved gas,[8] Midwestern, on February 7, 1956, filed a further supplement to its application specifying all the customers to whom it proposed to sell 395,998 m.c.f. of gas per day.[9] It named the various dis-

---

[7] Midwestern informed the Commission that it "offered to sell large quantities of natural gas to [the Peoples system] at a price substantially less than the incremental cost of the new gas supply proposed" in Peoples' own expansion plans.

[8] As the presiding examiner put it in his opinion denying Peoples' motion to dismiss Midwestern's application, "for reasons not yet explained in the record, some of the movants [the Peoples companies] have refused to purchase gas at wholesale from Midwestern, preferring instead to attempt to obtain their additional requirements from other sources." 16 F.P.C. at 481.

[9] The quantities proposed to be delivered are the estimated fifth-year peak-day requirements of the named customers. Obviously, original deliveries will be much lower, so that

tributors who would receive 280,998 m.c.f. per day and resell it to customers in Wisconsin, Minnesota, western Michigan and eastern North Dakota. The only customers named in the northern Illinois-Indiana area were the United States Steel Corporation and the Inland Steel Company, to whom direct sales of 115,000 m.c.f. per day would be made. Obviously, no further specification could be made of proposed sales in the area served by the Peoples system in view of the latter's control of the distribution system and its refusal to buy from Midwestern.[10] But a Midwestern officer testified:

> . . . we are not seeking to serve only a portion of these markets for a short time. We intend to serve all of the markets and meet every reasonable service demand from them.
>
> • • •
>
> Midwestern is seeking to serve all those areas which are economically feasible to serve all the way from its line from Emerson, Manitoba, to Kankakee, Illinois . . . .
>
> . . . as a policy, Midwestern will propose to render service to substantially all areas within economic distance of its lines.
>
> . . . In Chicago and Northern Indiana, north of Kankakee, Peoples Gas Light and Coke Company and their subsidiary pipeline companies have been serving under a policy of scarcity and we hope to make gas available in that area.

What Midwestern's proposal comes to, then, is an undertaking to bring into a large gas shortage area over

---

Midwestern, if it constructs its facilities more rapidly than the demand grows, may have a considerable uncommitted reserve capacity in the early stages of operation.

[10] Distributors of Peoples system gas in the northern Illinois-Indiana area, other than Peoples itself, were approached by Midwestern, but, though they all need more gas than the Peoples system is supplying, would not commit themselves to buying from Midwestern.

400,000 m.c.f. of gas per day, with very considerable future expandability, to supply any customer within economic reach, the only presently specifiable customers in the northern Illinois-Indiana area being the two steel companies.

The Minnesota area sought to be served by Midwestern is also sought to be served by Northern under an application for a certificate for expansion of its system. Some 58 communities are designated for service under both proposals. The Wisconsin area proposed to be served by Midwestern is also proposed to be served by Michigan Wisconsin under an application for a certificate for expansion of its system. Most of the communities which the latter proposes to serve are also to receive service under Midwestern's proposal. The Commission accordingly consolidated the applications of Midwestern, Northern and Michigan Wisconsin [11] for comparative hearing.

The extent to which Midwestern's proposal affected the Peoples system is indicated by the petitions to intervene filed by the system companies. Natural, for example, alleged that "it is clear that Midwestern and/or Tennessee intend to compete with Natural for the sale of gas in Natural's existing markets; that Natural has a substantial economic interest that will be directly affected by the proposals of Midwestern and Tennessee; and that the proper protection of both Natural and the public which it serves requires the full participation by Natural in each of such dockets." [12] The various Peoples companies were granted intervention in Midwestern's case

---

[11] Also consolidated in this proceeding were the related applications supporting each of the three principal applications, *e.g.*, Tennessee's application for a certificate for additional facilities required to supply gas to Midwestern.

[12] A similar allegation was made by Texas Illinois. Chicago District and Peoples itself likewise claimed an economic interest in Midwestern's proposal.

and participated as parties in the hearings thereon. On February 14, 1956, the day those hearings began, Natural filed its own application for a certificate authorizing an expansion of service. And in his opening statement at the hearing, Natural's counsel, referring to the program of "expansion of gas service by the Peoples companies, of which the application filed today by Natural is but another important step," declared, "The Midwestern project is completely incompatible with this program."

The substance of Natural's application, as supplemented by applications later filed by Chicago District, Colorado Interstate Gas Company (Colorado Interstate), and Pacific Northwest Pipeline Corporation (Pacific Northwest), is a proposal to bring into the northern Illinois-Indiana area an additional 485,000 m.c.f. of gas per day, which amount includes 115,000 m.c.f. per day to be sold to Peoples and another distributor for resale to the same two steel companies proposed to be served by Midwestern. To carry the increased capacity, Natural's present facilities are to be expanded by adding pipe along 415 miles of its line and by supercharging all its main line compressor stations. To carry the added gas to the distributors from Natural's line at Joliet, Chicago District is to expand its facilities. About 95 per cent of the additional gas is to be supplied to Natural by Colorado Interstate, which will expand its facilities for that purpose. Colorado Interstate, in turn, is to obtain 117,500 m.c.f. per day from Pacific Northwest, requiring an expansion of the latter's facilities as well.[13]

---

[13] An interrelated application was also filed by Texas Illinois proposing to deliver its entire capacity to Natural on a cost-of-service basis and have the latter take over the sales to all of Texas Illinois' distributors. This intra-system change, though an integral part of the Natural proposal, involves no new facilities or service and need not concern us here.

II

PROCEEDINGS BEFORE THE COMMISSION

On September 14, 1956, the Commission consolidated for joint processing Natural's application and the interrelated applications of Chicago District, Texas Illinois, Colorado Interstate and Pacific Northwest. On September 24, 1956, it granted the petition of Midwestern and Tennessee to intervene in that consolidated proceeding, just as Natural and its interrelated parties had been granted intervention in the proceedings on the Midwestern and Tennessee applications. Thereafter, Midwestern and Tennessee moved for a consolidation of the Natural Gas, et al., proceedings with the Midwestern, et al., proceedings.[14] Natural and its interrelated parties not only opposed this motion, but also petitioned for reconsideration of the grant of intervention to Midwestern and Tennessee. The Commission denied the latter petition on November 21, 1956, and set the Natural case for hearing.[15]

In setting the Natural case for hearing, the Commission directed that there be a prior presentation by each applicant of "evidence as to market demands," after which the record was to be certified to the Commission, so that it could preliminarily decide "the issue of exclusiveness" between the Natural and Midwestern proposals. The preliminary stage of the hearing was completed and the record was certified to the Commission. On that record, the Commission ordered, on March 13, 1957, that "the

---

[14] There is no order in the record specifically disposing of this motion, but the consolidation order of March 29, 1957, see *infra*, without referring to the motion, presumably granted it in part and denied it in part.

[15] By order of November 30, 1956, as modified by order of December 26, 1956, and interpreted by order of January 31, 1957.

proceedings upon that portion of the application filed by [Natural] relating to the authorization which it seeks to transport natural gas in interstate commerce and to sell natural gas in interstate commerce to [Peoples and another distributor] in the volume of 115,000 Mcf per day for resale to [the two steel companies] be and it is [*sic*] severed from the proceedings upon the application of Natural . . . insofar as such application and the proceedings thereon relate to authorization sought by Natural . . . to construct and operate facilities and to sell natural gas in interstate commerce to distribution companies located in noncompetitive areas not proposed to be served by Midwestern." This is the first of the orders here under review. The Natural case, minus the severed portion, was directed to proceed to final hearing and decision as provided by earlier order.[16]

Thereafter, on March 29, 1957, the Commission issued an order (1) consolidating the severed portion of the Natural application to be heard with the applications of Midwestern, Northern and Michigan Wisconsin and those interrelated with the latter three applicants;[17] and (2) terminating the intervention of Midwestern and Tennessee in the Natural case. This is the second order here under review.

III

THE ISSUES

The speedy provision of natural gas to communities which need it is a proper administrative objective. Con-

---

[16] See *supra* note 15.

[17] Tennessee, for example, was made a party to this consolidated proceeding by virtue of the relation of its application to that of Midwestern. The applicants interrelated with Natural (Texas Illinois, Chicago District, Colorado Interstate and Pacific Northwest) were not joined in the consolidated proceeding.

solidating applications, to the extent that it complicates the administrative process, is likely to interfere with that objective. Such consolidation is nevertheless required when the applications are mutually exclusive. *Ashbacker Radio Corp.* v. *Federal Communications Comm'n*, 326 U.S. 327 (1945). And when the Commission adopts a procedure which precludes a true comparative hearing of conflicting applications, review may be sought here without awaiting a grant of one of the applications. *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 97 U.S.App.D.C. 46, 228 F.2d 17 (1955). If, therefore, as petitioners contend, (1) the law requires a comparative hearing of their applications with those of Natural and its interrelated applicants and (2) the Commission's severance and consolidation orders precluded true comparative consideration, the respondent's argument that the petition to review is premature is not well taken. The question before us, then, is whether the orders complained of precluded a legally required comparative consideration of the respective applications.

The respondent concedes that there is an area of mutual exclusiveness between Midwestern's and Natural's applications as to which *Ashbacker* requires a comparative hearing, but it maintains that the procedure it adopted assured such a hearing. The petitioners, on the other hand, argue (1) that the Commission's delimitation of the area of mutual exclusiveness was unduly restricted, and (2) that, even as to that restricted area, they were denied a truly comparative hearing.

A. *The Area of Mutual Exclusiveness*

In ordering the severance, the Commission held that "there exists an area of 'mutual exclusivensss' as between the applications of Midwestern and Natural," but said:

> *It is clear from the record* in these proceedings that the area of exclusiveness . . . is in and near

> the City of Chicago, Illinois, and involves natural gas service to plants of United States Steel Corporation and Inland Steel Company located in that area. *It is equally clear* that the authorization sought by Natural . . . to sell [to two of its distributors] volumes of natural gas sufficient to serve U. S. Steel and Inland is severable from the other authorization by Natural [*sic*] . . . with respect to its "project." [Emphasis supplied.]

To us it is not "clear from the record" that the area of exclusiveness relates only to the proposed service to the steel companies. If anything is clear from the record, it is that Midwestern, though it specifically named only the two steel companies as its prospective customers in Natural's service area, proposes to supply gas to every customer in that area within economic reach of its line. As we have shown above, Midwestern solicited commitments from the various distributors in Natural's service area. Peoples, the largest of the distributors and Natural's parent company, flatly refused to buy gas from Midwestern. Natural's other distributors, though in need of additional gas and willing to buy it from any certificated supplier, quite naturally would not commit themselves to Midwestern's proposal while Natural was still in competition for the certificate. To say that they would not buy gas from Midwestern even if it became a certificated supplier is unrealistic. To hold that Midwestern's proposal to serve the various distributors in the northern Illinois-Indiana area is not sufficient unless it shows their specific commitments to buy the gas would amount to holding that a new supplier can never come into a one-supplier area.

The view we take of Midwestern's proposal is one elsewhere taken by the Commission. Thus in *Kansas Pipe Line & Gas Co., et al.*, 2 F.P.C. 29, 45 (1939), the Commission said:

> We believe that applicants . . . should show, among other things, that there exist in the territory pro-

> posed to be served customers who can reasonably be expected to use such natural-gas service.
>
> . . . We see no reason to require applicants before us to submit firm commitments for the sale of natural gas in all cases; it is, we feel, enough if applicants show, that, on the basis of experience in similar territory, there are reasonable grounds for anticipating that customers will be attached to the proposed facilities. This approach, we feel, has regard for the practical experience of the natural-gas industry and does not jeopardize the public interest.

The presiding examiner, in his Commission-adopted opinion denying a motion to dismiss Midwestern's application, quoted the above language from the *Kansas Pipe Line Co.* case, referred to "the admitted need for additional natural gas in the midwest," and said:

> If Midwestern's applications are ultimately granted and the others denied, it seems evident that Midwestern would have to expand the presently proposed system to take care of the needs. 16 F.P.C. at 482-83.

In its treatment of Natural's proposal, the Commission recognized the principle that a proposal must be construed according to its broad purport, not confined to specific undertakings. It noted in the severance order that Natural, though specifically allocating 115,000 m.c.f. of gas per day to its distributors for resale to the two steel companies, claimed it could and would dispose of that volume of gas to other customers if it were not authorized to deliver it for resale to the steel companies. The Commission then took the Natural application, for the purpose of determining the area of mutual exclusiveness with Midwestern's, as proposing sale of the 115,000 m.c.f. to *unnamed ultimate customers*. Midwestern's proposal to serve customers other than the steel companies in the northern Illinois-Indiana area, though certainly not specific, was no less specific than Natural's proposal to

dispose of 115,000 m.c.f. of gas per day to unnamed customers in that area.

Furthermore, granting there is room for construction in Midwestern's proposal, we think the Commission, in choosing between a broad construction which would require an over-all comparative hearing and a narrow one which would permit Natural's application to be processed unopposed, must be mindful that speed is not the only element in the public interest. That interest requires also that the gas hungry midwest be supplied with adequate service on the best possible terms and conditions. In ruling on the motion to dismiss Midwestern's application, the presiding examiner pointed out:

> . . . For example, a comparative hearing might conceivably provide the pathway for effective regulatory action in causing the application or applications ultimately approved to be implemented and enforced in a manner best calculated to meet the under-supply of gas in the midwest. The Commission's opportunity to have all the issues clearly posed and clearly joined and, if necessary, to exert its authority to accomplish needed results in the public interest, should not be nullified by granting the motions to dismiss. 16 F.P.C. at 479-80.

Even where applications are clearly not mutually exclusive, the Commission has power, one way or another, to mold the proposals to the public interest.[18] It would

---

[18] See, for example, the New England gas case in which the Commission rejected both applications and invited broader proposals, saying:

> "We are concerned here with a public need and demand for natural gas service in New England generally—*not in a portion of that area and not by a few selected distributing companies in that area.* It is inconceivable that anyone desirous of promoting the public good should urge that we now authorize one engaged in a business affected with the public interest *to pick and choose whom it wishes to serve without*

seem that given a choice of constructions of an application, the Commission should not prefer a construction which tends to preclude broad inquiry into public interest requirements. Broad areas of conflict often could, but seldom should, be resolved into enclaves of competition as narrow as the specific commonly proposed customers. If that policy were adopted, a party seeking to avoid the searching effect of a comparative hearing would only need to give up those customers. But the question would still exist which applicant should, in the public interest, serve those customers. The Commission should not adopt procedures that foreclose full inquiry into broad public interest questions, either patent or latent.

We think the Commission should have treated Midwestern's application as a proposal to serve generally the northern Illinois-Indiana area now served by the Peoples system. Under that view of the application, there is need for a comparative hearing as to the various elements of the Midwestern and Natural proposals, such as gas supply, economic feasibility, financing and design of facilities. Respondent contends, however, that despite its restricted construction of the Midwestern proposal, it has provided a procedure for an adequate comparative hearing. This brings us to a consideration of the consolidation order of March 29, 1957.

---

proper regard for the public good. Nor should we authorize any applicant to render partial service when it is clear at the outset, as shown by this record, that its plans do not provide the full service to which the people of New England are entitled." Northeastern Gas Transp. Co. v. *Federal Power Comm'n*, 195 F.2d 872, 875 (3rd Cir. 1952), emphasis in original.

The Commission also has power under § 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e), to impose upon an applicant conditions required by the public interest.

B. *The Comparative Hearing*

Having concluded that "it is clear from the record" that the area of mutual exclusiveness between the Midwestern and Natural applications is limited to the proposals to supply gas to the two steel companies, the Commission held it "equally clear" that the proposal to serve the steel companies is severable from Natural's application for authority to expand its system to supply an additional 485,000 m.c.f. per day to the northern Illinois-Indiana area. We have shown that the Commission's first conclusion is far from "clear." Its second conclusion is to us equally *unclear,* for there is certainly no physical severability of facilities to carry the gas proposed for the steel companies from the general system facilities. What the Commission did was to allow the Natural application and its various interrelated applications to go to hearing and decision without the competitive voice of Midwestern and Tennessee being heard and without the comparative merits of their proposals being considered. This it did by imposing on the proceeding a stipulation that none of the additional capacity would be used to supply the 115,000 m.c.f. per day originally scheduled for the steel companies. The question whether this stipulation should be removed was left to be resolved in a comparative hearing with Midwestern. That question and only that question was the "portion" of the Natural application consolidated for comparative hearing.[19]

[19] The applications of Pacific Northwest and Colorado Interstate for authority to increase their facilities in order to supply gas to Natural and the application of Chicago District to increase its facilities to carry Natural's added gas to the distributors are, of course, integrated with the Natural application. Accordingly they are all consolidated for processing in the Natural proceeding. But they have nothing to do with the question whether 115,000 m.c.f. per day

What the Commission consolidated for comparative hearing was the mutually exclusive aspects of the applications of Natural and Midwestern, *i.e.*, Natural's "insofar as such application seeks authorization to *transport* natural gas in interstate commerce and to *sell* natural gas to [distributors] in the total volume of 115,000 Mcf per day for resale to [the two steel companies]," and Midwestern's "insofar as such application seeks authorization to *construct and operate facilities for the transportation and sale* in interstate commerce of 115,000 Mcf of natural gas [to the two steel companies.]" Emphasis supplied. From the difference in description of the aspects of the two applications designated for comparative hearing, it seems plain that Natural's application for authority to *construct and operate expanded facilities* was not to be considered in the comparative hearing. Indeed, without consolidation into the comparative hearing of the applications interrelated with Natural's,[20] such consideration would be impossible. Therefore, on the basis of the Commission's own definition of the issue in the comparative proceeding and its limitation of the parties thereto, we cannot sustain its contention that the comparative proceeding it has provided is an adequate procedure for a comparison of the various elements of the Natural and Midwestern proposals.

The respondent argues, however, that despite the narrowly defined issue and the limitation of parties, the comparative proceeding was designed to permit inquiry into every aspect of Natural's proposal, including even

---

of the gas sold to Natural's distributors shall be resold to the two steel companies, the only "Natural" issue inserted in the comparative proceeding. Accordingly they were left out of that proceeding. By contrast, the applicants interrelated with Midwestern and with the other parties to the comparative proceeding were joined in that proceeding. See note 11 *supra*.

[20] See note 19 *supra*.

the feasibility of the proposals in the interrelated applications. Indeed we are told that Natural was expected, in the comparative proceeding, to make substantially the same justification of its whole proposal as it made in the separate proceeding on its own application.[21] While this would seem to be foreclosed by the definition of the issue; while it would seem to be impracticable without the presence as parties of interrelated applicants; and while it would seem to contradict the Commission's announced purpose of not complicating and delaying Natural's case by a comparative consideration of factors as to which the Commission thinks there is no mutual exclusiveness; we shall assume for the purpose of this discussion that Natural will indeed put in its whole case, presumably for the purpose of showing that, if authorized to supply the 115,000 m.c.f. per day to the steel companies, it will have the gas and the facilities to carry it. But, however fully Natural presents the elements of its proposal, the Commission's interest in that presentation extends only so far as the elements enter "into the determination of the requirements of public convenience and necessity *in the area of 'mutual exclusiveness.'*" Emphasis supplied. And that area, as has been shown, involves, in the Commission's eyes, only the competing proposals to serve the two steel companies. So, even if the procedure adopted by the Commission permits a *presentation* of all or sub-

---

[21] Our attention is called to the following language used by the Commission in its order of May 14, 1957, dismissing the appeal of Midwestern and Tennessee from the rejection by the Secretary of their petition for rehearing of the severance and consolidation orders:

> "In other words every party must offer in the comparative hearing testimony with respect to each of the elements that would go into the ultimate determination of the certificate application notwithstanding the fact that like evidence may have been presented in connection with another aspect of the same application."

stantially all relevant evidence, it does not permit a *consideration* of that evidence in determining "the requirements of public convenience and necessity" in the whole northern Illinois-Indiana area which Midwestern wishes to serve. We hold, therefore, that the Commission has not afforded Midwestern the comparative hearing required under *Ashbacker*.

The Commission would, of course, consider public interest requirements in determining, in the separate noncomparative Natural proceeding, whether Natural should be authorized to construct and operate its expanded facilities. It goes without saying, however, that a comparative hearing casts a brighter light and, in this case, the law requires such hearing. Without it the Commission would close its eyes to the public interest questions raised by Midwestern, such as whether the millions of people in Natural's service area would enjoy less expensive gas if Natural bought from Midwestern rather than expanded its own facilities.

In comparing proposals, moreover, the Commission is not limited to issues pressed by the applicants. Cf. *Clarksburg Publishing Co.* v. *Federal Communications Comm'n*, 96 U.S.App.D.C. 211, 215, 225 F.2d 511, 515 (1955). With both proposals before it, it could consider, for example, whether the public interest would be better served by bringing a new supplier into an important population and industrial center presently served by only one supplier, especially when the present supplier is controlled by the largest distributor;[22] whether the long-

[22] On April 30, 1958, in Criminal Action No. 58-CR-58, the federal grand jury for the Eastern District of Wisconsin returned an indictment against Peoples and certain other defendants charging violations of §§ 1 and 2 of the Sherman Antitrust Act. Natural, Texas Illinois and Chicago District were named as co-conspirators. The offenses charged relate, *inter alia*, to alleged exclusion of Midwestern from Natural's northern Illinois-Indiana market.

continued and pressing natural gas shortage in the area should be charged against the Peoples system, in determining comparative fitness to serve future needs; whether it is advisable to tap new sources of gas rather than rely upon the sources from which the Peoples system obtains and proposes to obtain its gas; or whether it is in the public interest to encourage the importation of gas from the large Canadian fields, as proposed by Midwestern, rather than deplete our own reserves. We express no opinion as to any of those issues, recognizing, as we do, that there is probably much to be said on both sides of each of them and that the inquiry is for the Commission to make. We say only that the duty imposed upon the Commission under the Natural Gas Act requires that it make the inquiry. It must therefore not adopt procedures that preclude making it.

The Commission's orders of March 13, 1957, and March 29, 1957, to the extent that they deny full comparative hearing of the applications of Midwestern, Natural and those interrelated with both are set aside and the case is remanded to the Federal Power Commission for further proceedings consistent with this opinion.

So Ordered.

Associate Justice Reed, retired, dissenting: This Court concludes that the facts in this record require the Federal Power Commission to permit petitioners, the Midwestern Gas Transmission Company and the Tennessee Gas Transmission Company, to participate fully in the hearing on the application of the Natural Gas Pipeline Company of America, and its affiliates, to increase largely its sales capacity. This increased capacity is in-

tended to give additional supplies to its distributing connections in the Northern Indiana-Chicago area. These are Northern Indiana Public Service Company [NIPSCO] and Peoples Gas Light and Coke Company [Peoples]. A part of the proposed increase was to supply the industrial needs of United States Steel Corporation and Inland Steel Company in Chicago, East Chicago, and Gary, Indiana.

For me the validity of the conclusion of this court depends upon whether petitioners seek an opportunity to serve the same consumers that the Natural Gas Pipeline and its affiliated and distributing companies are serving and seeking to serve—that is, the consumers of Chicago and Northern Illinois. Where competing gas companies seek certificates of convenience and necessity from the Federal Power Commission for service to the same consumer groups, the law requires as a matter of fairness that the FPC hear all applicants in the same proceeding, with opportunity to all parties to examine the proposals of one another, so as to bring out before the Commission the facts necessary for the Commission to properly appraise the public interest as between the contending suppliers. This is the doctrine of *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U.S. 327. No one questions its soundness, where applicable. In recognition of and in conformity with that rule, the F.P.C. has directed by order of March 13, 1957, in *Natural Gas Pipeline Company of America*, Docket No. 9966, 17 F.P.C. 469, that the mutually exclusive portions of the applications of "Natural" and "Midwestern", in the view of the Commission, be severed and heard in another proceeding where both are parties—the application of Midwestern in Docket Nos. G-9451 et al., order of March 29, 1957, 7 F.P.C. 461.

There is thus no clear-cut difference between the parties as to the law where applications of different lines seek mutually exclusive certificates of public convenience

and necessity. The controversy centers around the facts in this case and the applicability of the recognized rule as to mutually exclusive applications for certificates. In such circumstances, the determination of the administrative agency carries great weight with me. The agency is the selected impartial entity for settling the public interest when rivals seek to serve the same consumers. If Midwestern was seeking an opportunity to serve generally the Chicago-Northern Indiana area with a duplication of Natural's service, such offer would fall within the Ashbacker Rule. But here Midwestern in that area actually seeks certification only for the steel companies, with vague suggestions, set out in the Court's opinion, that once in the area it may in the indefinite future ask a wider authority.

Congress created the Commission to deal with the public interest, endowed it with a rule-making power to enable it to assure fair opportunity for open competition for service facilities, and charged it with administrative responsibilities. It is the expert body, not the judiciary, that is concerned with where, when and to whom, in the public interest, certificates are to be granted. Cf. *National Broadcasting Co.* v. *United States*, 319 U.S. 190; *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192. I am of the view that there was substantial reason for the action of the Commission in entering its two orders for severance and adversary hearing and therefore from the whole record would support the F.P.C. conclusion. *O'Leary* v. *Brown-Pacific-Mason*, 340 U.S. 504, 508.

Briefly my reasons are these. The Court concedes, and the record bears out its statement, that Midwestern "specifically named only the two steel companies as its prospective customers in Natural's service area." It adds that Midwestern "proposes to supply gas to every customer in that area within economic reach of its line." I do not so read the record. The Midwestern application was initiated by an application, filed October 10, 1955, docket No. G-9451, 20 Fed. Reg. 9032. It said:

> "The principal market territory to which Applicant's pipeline will make natural gas available lies in Minnesota, Wisconsin, western Michigan and eastern North Dakota. Much of this area is presently without natural gas service, despite the strenuous efforts to get natural gas which have been exerted for many years by public officials and officials of the local gas industry, and it is primarily service to this long neglected market that Applicant proposes herein."

Every community listed for service was in Minnesota or Wisconsin.

In the original application this general statement appeared:

> "Other parts of this general market territory logically should be served by Applicant's pipeline system. Applicant has received many requests for natural gas service from gas distributing companies and industrial plants in this area. Many of these potential customers already enjoy the advantages of natural gas service but the fact that their present supplies are inadequate is forcefully demonstrated by long lists of unaccepted applications for natural gas service. There is no doubt that the entire territory accessible to Applicant's pipeline system will benefit from service by a new natural gas pipeline system whose management has an established reputation for aggressive merchandising of natural gas."

In amendments it was repeated and in 1956 Midwestern listed the two steel companies as prospective consumers. No others have been named. Generalized statements of a desire to obtain more customers wherever profitable to the applicant or to expand into areas of gas shortage outside the limits of its projected service are not enough to occasion admission of Midwestern, by judicial direction, into the application of Natural and its affiliates to obtain certificates to enable it to meet the inadequacies of their present service.

The application of Midwestern states a daily capacity

of 401,574 m.c.f. Its supplement of February 7, 1956, to its application sets up an allocation wholly out of the Chicago area except as to the steel companies of 395,998 m.c.f. It would seem to have little to offer the Chicago area consumers.

Natural and its affiliates have a line extending from the gas fields of Texas through Oklahoma, Kansas, Nebraska and Iowa to the Chicago area. Another reaches from the South Gulf Coast region of Texas through Arkansas and Missouri. It obtains quantities of gas from Colorado Interstate and the wells of Kansas. Eighty per cent of their total annual sales are in Chicago and surrounding areas. The balance goes to local gas companies along the lines. Additional gas is available and needed for the area now served. The lines and stations requested for improvements are estimated to cost around eighty million. This immediate need for increased service to the Chicago area led the Commission to exclude from their present consideration the mutually exclusive portions of the Midwestern and Tennessee applications for service to the steel companies. The Commission said:

> "We feel that action looking toward increased service to markets presently being served in non-competitive areas should not, where possible, be deferred until after the competitive aspects of the respective applications can be considered and determined."

The Commission further pointed out that in allowing Natural's application to proceed to a grant without the intervention of Midwestern, the Commission was in a position to protect the "limited area of mutual exclusiveness," i.e., the service to the steel companies, by a properly conditioned certificate to Natural. I see no reason why this cannot be done.[1]

---

[1] See F.P.C. order of May 14, 1957, in Docket No. G-2306, *American Louisiana Pipe Line Company*, and other dockets, all involved in Midwestern's pending application. 17 F.P.C. 671.

Courts should be slow to interfere with routine interlocutory proceedings of administrative agencies. A major advantage of agency, as opposed to judicial proceedings, is their flexibility. If Midwestern desires to serve other consumers than those stated in its application, it can set out its purpose, the needs of the public, and its gas and financial resources. This has not been done.

I would uphold the Commission in its effort to get adequate gas promptly into the Chicago area by affirming its order. The action taken by the Commission was an exercise of its discretion as to how to manage the routine hearings of its applications. Its conclusion was reached after detailed consideration of how to handle a conflict over the service to the steel companies. Under such circumstances courts are to leave decisions "to the expertise of the agency burdened with the responsibility for decision." [2]

---

[2] *Panama Canal Co.* v. *Grace Line*, Nos. 251 and 252, October Term 1957, decided April 28, 1958, Supreme Court of the United States, p. 9 of advance sheets.

[Caption Omitted]

JUDGMENT

This case came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the orders of March 13, 1957 and March 29, 1957, on review in this case be, and they are hereby, set aside to the extent that they deny full comparative hearing of the applications of Midwestern Gas Transmission Company, Natural Gas Pipeline Company of America and those interrelated with both, and that this case be, and it is hereby, remanded to the Federal Power Commission for further proceedings consistent with the opinion of this Court.

Dated: May 13, 1958.

Per Circuit Judge BAZELON.

Separate dissenting opinion by Mr. Justice REED.

[Caption Omitted]

Before: EDGERTON, Chief Judge, PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, Circuit Judges, in Chambers.

ORDER

Upon consideration of respondent's petition for rehearing en banc, it is

ORDERED by the court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: June 18, 1958.

Circuit Judges MILLER, DANAHER, BASTIAN and BURGER would grant the petition.

[Caption Omitted]

Before: REED, Associate Justice of the Supreme Court, Retired, Sitting by Designation, EDGERTON, Chief Judge, and BAZELON, Circuit Judge.

ORDER

Upon consideration of the respondent's petition for rehearing, it is

ORDERED by the court that the petition for rehearing be, and it is hereby, denied.

Per Curiam.

Dated: June 18, 1958.

Justice REED would grant the petition for rehearing.

[Caption Omitted]

Before: REED, Associate Justice of the Supreme Court, Retired, Sitting by Designation, EDGERTON, Chief Judge, and BAZELON, Circuit Judge.

ORDER

Upon consideration of respondent's motion to vacate the opinion and judgment of this court for mootness, of petitioners' answer and of interven s' answer, it is

ORDERED by the court that the aforesaid respondent's motion be, and it is hereby, denied.

Per Curiam.

Dated: September 30, 1958.

APPENDIX B

The Natural Gas Act, 52 Stat. 821, as amended, 15 U. S. C. 717–717w, provides in pertinent part:

> SEC. 7 * * * (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the

route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be

denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

* * * * *

Sec. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying

that the order of the Commission be modified or set aside in whole or in part. * * * The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

U. S. GOVERNMENT PRINTING OFFICE 1958 O—487963